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SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1943

No. 449

MERGER MINES CORPORATION, a corporation, MORRIS PEARSON and EBBA PEARSON, his wife,

Petitioners,

vs.

J. V. GRISMER, P. R. SIMPSON, M. C. THORNHILL and O. C. NEWMAN.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, and Brief in Support Thereof.

R. W. NUZUM,

Attorney for Petitioners, Morris Pearson and Ebba Pearson, his wife.

WILMOT W. GARVIN,

Of Counsel for Petitioners, Morris Pearson and Ebba Pearson, his wife.

INDEX TO PETITION

	Page
Summary Statement of the Matter Involved	2
Jurisdictional Statement	5
Statutory Provision Believed to Sustain Jurisdiction	5
Date of Decree	5
Nature of the Case and Rulings of the Court	5
Questions Presented	6
Reasons Relied on for Allowance of the Writ	7
Certificate of Counsel	8

INDEX TO BRIEF

Reference to Opinions of the Courts Below	9
Opinion of the District Court for the Eastern District of Washington, Northern Division, Reported in 43 F. Supp, 990	9
Opinion of the United States Circuit Court of Appeals for the Ninth Circuit, Reported 137 Fed. (2d) 335	9
Jurisdiction	10
Assignments of Error	10
Statement of the Case	12
Argument	13
Conclusion	18

TABLE OF CASES

Page

Berkley Hillside Properties Co. vs. Kelly, 247 Pac. 600 16

Child vs. Idaho Hewer Mines, 284 Pac. 80 16

Forsyth vs. City of Hammond, 166 U. S. 506; 41 L. Ed. 1095 5-10-17

Glenn vs. Porter, 73 Fed. 275 15

J. V. Grismer, et al vs. Merger Mines Corp., et al, 43 F. Supp. 990 1-9

In Re Church Building Company, 299 U. S. 24; 81 L. Ed. 16 5-10-17

Merger Mines Corp., et al vs. J. V. Grismer, et al, 137 Fed. (2d) 335 1-9

Radio Electronics Television Co. vs. Bartniew, 32 Fed. Supp., 431 16

Rochester & K. L. Land Co., vs. Raymond, 53 N. E. 507 15

Seyberth vs. American Commander M. & M. Co., 245 Pac. 392 16

Webster vs. Upton, Assignee, 91 U. S. 65 16

Whitney vs. Butler, 118 U. S. 655 14

TEXTS

Page

13 American Jurisprudence, P. 374, 375; Sec. 286.... 15

Fletcher's Cyclopedia of Corporations, Vol. 6, P. 6274, 6275, 6276, 6277; Sec. 3769..... 14

Fletcher's Cyclopedia of Corporations, Vol. 6, P. 7060, 7061, 7062; Sec. 4111 15

Fletcher's Cyclopedia of Corporations, Vol. 7, P. 7531; Sec. 4274 13

Fletcher's Cyclopedia of Corporations, Permanent Edition, P. 233; Sec. 5463, 5464 14

STATUTES

Judicial Code, Section 240 amended, Title 28 U. S. C. A. Section 347 (a). (Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938 5-10

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MERGER MINES CORPORATION, a corporation, MORRIS PEARSON and EBBA PEARSON, his wife,

Petitioners,

vs.

J. V. GRISMER, P. R. SIMPSON, M. C. THORNHILL and O. C. NEWMAN.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit,

The petitioners, Morris Pearson and Ebba Pearson, his wife, pray that a Writ of certiorari issue to review the decree entered in the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled matter, which decree was filed and entered July 27, 1943, (R. p. 354) affirming as modified the judgment of the District Court of the United States for the Eastern District of Washington, Northern Division. The opinion (R. pp. 335-353) upon which the decree of the Circuit Court of Appeals was entered is reported in 137 Fed. 2d 335 (Advance Opinions.)

SUMMARY STATEMENT OF THE MATTER INVOLVED

This action arose by virtue of an agreement between Pearson and the defendant Merger Mines Corporation, wherein in order to save the corporation from insolvency by virtue of third party claims the Pearsons agreed with the corporation to loan stock to the Corporation to the end that the proceeds therefrom might liquidate the indebtedness and save the corporation. They loaned in excess of 772,000 shares of the stock of the Corporation. Exhibit "F" (R. pp. 159 to 189) shows the total borrowed stock sold and issued by the Corporation to third party creditors from the stock turned over to the Corporation by Pearsons to be 770,541 shares. The capital stock of the corporation was to be increased by 1,000,000 shares, which was done, and that million shares remain in the treasury. We are not citing the record, because the facts were undisputed.

The By-Laws, being Exhibit "E", found at Page 307 of the Supplemental Record, at Section 39, Subdivision H thereof, provides: "While the shares remain the property of the corporation, they are not assessable, nor must dividends be declared thereon, but all assessments and dividends must be apportioned among the shares held by the other stockholders of the Corporation."

The contract with reference to issuing Pearsons' stock from the increase is found in Exhibit "A", pages 155 and 157 of the record. This shows the stock was to be returned to the Pearsons, share for share,

as soon as the new issue is at hand. As to the second block of it, "This stock to be returned to Morris Pearson as soon as the new issue of stock is available."

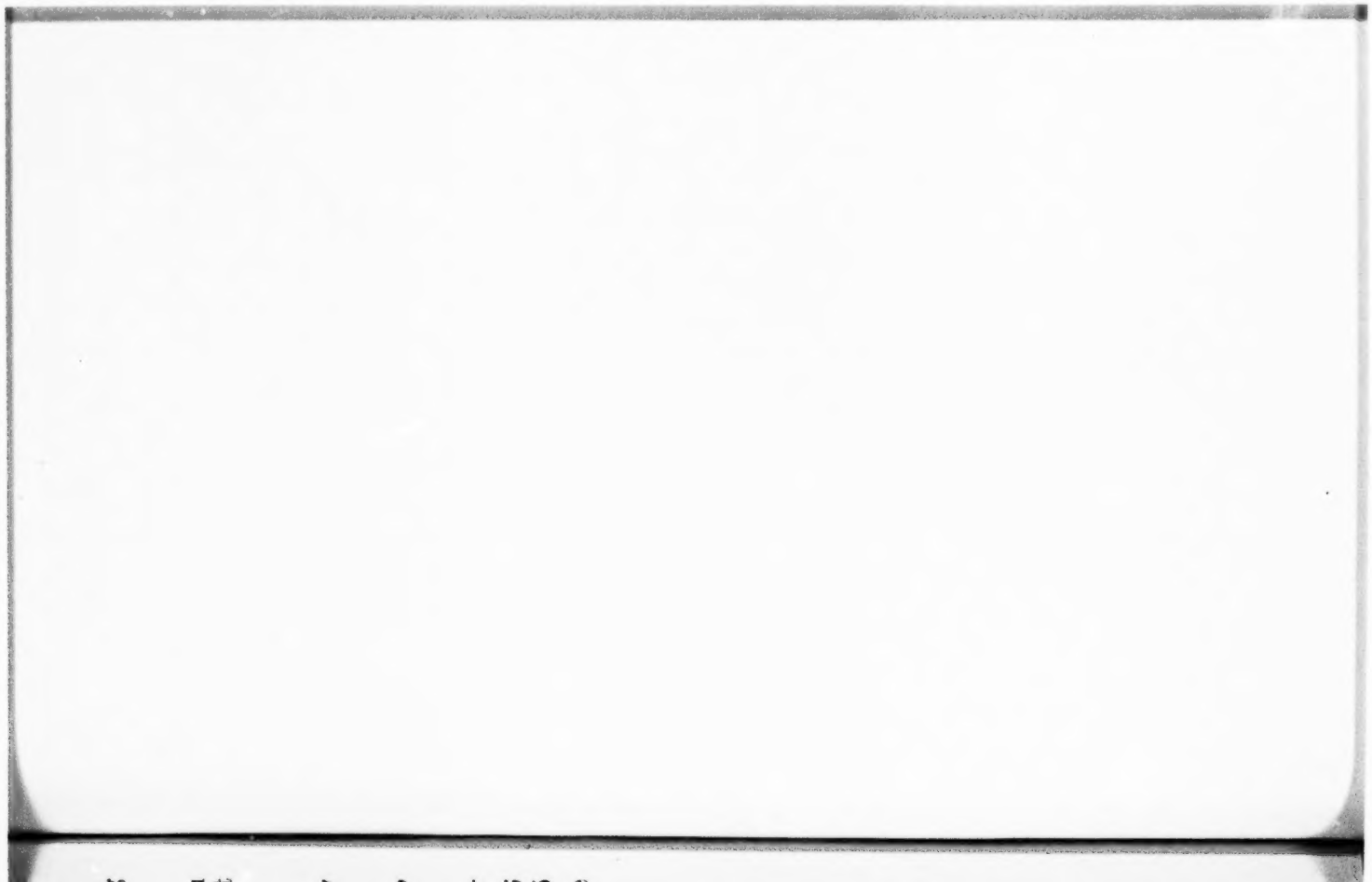
There is no dispute as to the loan of the stock, and said stock was never returned to the Pearsons, but used by the corporation, and the second issue remains in the treasury. Pearson was advised the stock could not be issued without registration, and it never was registered. This testimony is found in the testimony of LeMaster, pages 48 and 49 of the record, and Exhibits 7, 8, 9, 9A, and 9B, found at pages 207 to 219, inclusive, of the record, and exhibits 10 to 14, found at pages 220 to 227, inclusive, of the record, being letters from the Regional Director of the Securities and Exchange Commission. He was so advised by Mr. Whitla, one of the attorneys for the corporation, and an officer thereof. See record pages 78, 79, 84 and 85. He was so advised by Mr. Wayne, the General Counsel of the Corporation. See record pages 109 to 114, inclusive, and the testimony of Morris Pearson, pages 124 to 127, and 142 to 149 of the record, showing Pearson was attempting to have the stock issued to him. That Pearson was endeavoring to get the stock issued is shown by the testimony of LeMaster, Whitla, and Wayne. See Exhibits 7 and 8, at Page 8; Exhibit 9, at pages 207 and 208; Exhibits 9A and 9B at pages 212 to 219; and Exhibits 10, 11, 12 and 14, on pages 222, 224, 226 and 227.

The position taken by the attorneys for the plain-

tiff is shown on page 154 of the record, and ending on page 155. Questioned by Judge Schwellenbach:

> "Judge Schwellenbach: Do you contend you can make him pay assessments on stock he hasn't got?
>
> "Mr. Graves: Yes, just so.
>
> "Judge Schwellenbach: And he can't possibly get?
>
> "Mr. Graves: It is my contention that he can, but whether he can or can't, yes."

That the stock could not be registered, see the testimony of LeMaster, pages 48 and 49 of the record; Whitla, 78 and 79 of the record; Whitla, 84 and 85 of the record; and Wayne, 109 to 114, inclusive, of the record, giving the reasons therefor.



JURISDICTIONAL STATEMENT

Statutory Provisions Believed to Sustain Jurisdiction

The jurisdiction of this Court is invoked under Judicial Code Section 240 amended, Title 28 U. S. C. A. Section 347 (a). Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938.

Cases believed to sustain the jurisdiction of this Court are:

Forsyth vs. City of Hammond, 166 U. S. 506; 41 L. Ed. 1095.

In Re Church Building Company, 299 U. S. 24; 81 L. Ed. 16.

Date of Decree

The date of the decree of the United States Circuit Court of Appeals for the Ninth Circuit, which it is sought to have reviewed, is July 27, 1943. (R. p. 354).

Nature of the Case and Rulings of the Court

Morris Pearson and his wife loaned to the Merger Mines Corporation a total of 770,541 shares of stock, which were used by the Corporation to pay its indebtedness. This is shown by Exhibit F. (R. pp. 159 to 189 Inclusive). This stock was to be returned out of an increase of the capital stock of the Corporation, which was affected, citations having heretofore been made as to where these things are contained in the record. The million shares remained in the treasury.

Issuance was made impossible because the Corporation could not register with the Securities and Exchange Commission, and they were so advised by their counsel, their expert certified public accountant, and the Securities and Exchange Commission, and, therefore, refusal was had. (Citations heretofore made as to the record sustaining these things.) Action was commenced to compel the payment of these assessments, and it was contended by the plaintiffs that whether the stock could be issued or not, the assessments should be paid. The question then arises: First, was the individual who loaned the stock to the corporation, and which was accepted by the Corporation, liable for the assessments on that stock? Secondly, was he liable for assessments on stock remaining in the Corporation and which was not issued to him and could not be issued to him? The By-Laws of the corporation provide that stock in the treasury was not assessable and not enttled to dividends. (R. p. 307).

The ruling of the Court was that all of the stock was assessable. (R. p. 354).

Questions Presented

1. May a stockholder who has loaned his stock to the corporation for the purpose of preventing insolvency of said corporation and paying third party creditors' claims, which claims were actually paid from the loaned stock or the proceeds of said stock, be liable for subsequent assessments on the loaned stock where the corporation accepted delivery of the stock prior to the levying of subsequent assessments

here involved, and used the same for the purpose of liquidating corporate indebtedness to third party creditors, and where the one loaning had no dominion or control over the stock after delivery to the Corporation?

2. After the increase of the capital stock of the corporation in order to repay the loan, the increase all being in the treasury, is that stock in the treasury assessable prior to the issuance to the party to whom the stock was due, the by-laws providing that treasury stock is not assessable?

Reasons Relied on for Allowance of the Writ

In making the decision sought to be reviewed, the United States Circuit Court of Appeals for the Ninth Circuit has, we believe, "decided an important question of local law in conflict with applicable local decisions, and has decided an important question of general law in a way probably untenable or in conflict with the weight of authority."

For this reason it is respectfully prayed that this petition should be granted.

Respectfully submitted,

R. W. Nuzum,
Attorney for Petitioners, Morris Pearson and Ebba Pearson, his wife.

Wilmot W. Garvin,
Of Counsel for Petitioners, Morris Pearson and Ebba Pearson, his wife.

STATE OF WASHINGTON, }
County of Spokane } ss.

R. W. NUZUM, a member of the bar of the Supreme Court of the United States and one of the counsel for petitioners herein, does certify that the foregoing petition is well founded and not interposed for delay.

R. W. NUZUM.

SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1943

No.....

MERGER MINES CORPORATION, a corporation, MORRIS PEARSON and EBBA PEARSON, his wife,

Petitioners,

vs.

J. V. GRISMER, P. R. SIMPSON, M. C. THORNHILL and O. C. NEWMAN.

Brief in Support of Petition for Writ of Certiorari

OPINIONS OF THE COURTS BELOW

The ruling of the District Court for the Eastern District of Washington, Northern Division, is reported in *J. V. Grismer et al vs. Merger Mines Corporation,* et al, 43 F. Supp. 990.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit, is reported in 137 Fed. 2d, 335, upon which the Court entered the decree here sought to be reviewed, which modified the judgment of the District Court by requiring certain portions of the stock of the Corporation to be registered with the Securities and Exchange Commission.

Jurisdiction

The jurisdiction of this Court is invoked under Judicial Code Section 240 amended, Title 28 U. S. C. A. Section 347 (a). Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938.

The date of the decree of the United States Circuit Court of Appeals for the Ninth Circuit, which it is here sought to have reviewed, is July 27, 1943. (R. p. 354).

A statement of the grounds upon which the jurisdiction of this Court is invoked is set forth in the preceding petition, which statement of grounds is incorporated and made a part of this brief as if it were specifically set forth.

Cases believed by the petitioners to sustain the jurisdiction of the Supreme Court of the United States, and relied on for the exercise of said jurisdiction are:

Forsyth vs. City of Hammond, 166 U. S. 506; 41 L. Ed. 1095.

In Re Church Building Company, 299 U. S. 24; 81 L. Ed. 16.

Assignment of Error

1. The Circuit Court of Appeals erred in entering a decree affirming the judgment of the District Court as modified, wherein it is held that a stockholder who has loaned his stock to the corporation for the purpose of preventing insolvency of said corporation and paying third party creditors' claims, which claims

were actually paid from the loaned stock or the proceeds of said stock, is liable for subsequent assessments on the loaned stock where the corporation accepted delivery of the stock prior to the levying of subsequent assessments here involved, and used the same for the purpose of liquidating corporate indebtedness to third party creditors, and where the one loaning had no dominion or control over the stock.

2. After the increase of the capital stock of the corporation in order to repay the loan, the increase all being in the treasury, the Court held that the stock in the treasury is assessable prior to the issuance to the party to whom the stock was due, the by-laws providing that treasury stock is not assessable.

STATEMENT OF THE CASE

The statement of the case is incorporated herein for the purpose of brevity by reference as set out in the preceding Petition, as specifically set forth in the Summary Statement of the Matter Involved, The Nature of the Case, and the Rulings of the Court.

ARGUMENT

The decision sought to be reviewed is in conflict with the opinions of this Court and is in conflict with applicable local decisions, and the Circuit Court has decided an important question of general law in a way untenable and in conflict with the weight of authority.

The Circuit Court by affirming as modified the decree or judgment of the District Court has in effect decided this important question of law in a manner that is contrary to the local Supreme Court decisions in all those states in the western part of the United States, particularly in relation to mining law. To sustain the decision of the Circuit Court of Appeals would be in effect to reverse the Supreme Courts of the several states in the western part of the United States, not by a positive decision, but rather by silence and acquiescence. The question of liability for assessments on stocks, particularly on mining stocks in those states in which mining is one of the principal industries, has been definitely established by the decisions of the State Supreme Courts. The general rule and the rule recognized by the weight of authority is as follows:

> "Generally an assessment can only be levied upon persons who are stockholders at the time, and a person who has ceased to be a stockholder by a valid transfer of his shares cannot be assessed."
>
> Fletcher's Cyclopedia of Corporations, Volume 7, Page 7531, Section 4274.

> "As a general rule, a valid transfer of shares when completed substitutes the transferee for the transferor as a stockholder in the corporation with reference both to rights and liabilities."
>
> Fletcher's Cyclopedia of Corporations, Permanent Edition, Page 233, Section 5463-5464.
>
> *Whitney vs. Butler,* 118 U. S. 655.

The rule is recognized again by Fletcher in discussing the question of "calls" on unpaid subscriptions. The rule as to "calls" and "assessments" is exactly the same.

> "Since a valid and complete transfer of shares operates as a novation of the contract of membership, and substitutes the transferee for the transferor as a stockholder, it is well settled in most jurisdictions in the absence of express provision to the contrary . . . Because the transferor ceases to have a voice in the management of the company, and has no longer any interest or ownership in the property, he is freed from further liability, and the transferee is substituted and subjected to further calls by the Corporation and further aid to carry on its business and fulfill its corporate ends."
>
> Fletcher's Cyclopedia of Corporations, Volume 6, Page 6274, 6275, 6276, and 6277; Section 3769.
>
> "In the absence of a statutory provision or an agreement to the contrary, it is generally held that a bona fide transfer of stock of the corporation discharges the transferor from any further liability either to the corporation or to creditors for calls or assessments made after the transfer, but not for calls made prior thereto, and the transferee takes his place and becomes liable for calls or assessments made after the transfer, but not for those made before. In other words, a stockholder may generally relieve himself from

liability by transferring the same, and the transferee will become liable therefor in his place."

Fletcher's Cyclopedia of Corporations, Volume 6, Page 7060, 7061, 7062; Section 4111.

"A subscriber to the capital stock of the corporation, who in good faith transfers his stock to a third person, and has such transfer entered upon the books of the corporation, ceases, according to the weight of authority, to be liable for future calls. The consent of the corporation to the transfer is, in effect, a novation, a release of the transferrer, and an acceptance of the transferee as liable for future calls . . . A corporation which permits the transfer of stock by cancelling the certificate and issuing a new one to the purchaser, and afterward brings an action against him for the unpaid portion of the stock, ratifies the transaction and cannot subsequently claim that the transfer is ineffectual to release the original shareholder from liability as such on the ground that it was not made in good faith."

13 Am. Jur. 374, 375; Section 286.

Rochester and K. F. Land Co. vs. Raymond, 53 N. E. 507 (N. Y.)

Glenn vs. Porter, 73 Federal, 275.

This Court has stated in *Webster vs. Upton,* Assignee, 91 U. S. 65, Page 69:

"If the law implies a promise by the original shareholders or subscribers to pay the full par value when it may be called, it follows that an assignee of the stock when he has come into privity of the company by having stock transferred to him, is equally liable."

and again at Page 70:

"The cases agree that whenever the name of the vendee of shares is transferred to the regis-

ter of shareholders, the vendor is exonerated and the vendee becomes liable for calls. We think, therefore, the transferee of stock in an incorporated company is liable for calls made after he has been accepted by the company, and being thus liable, there is an implied promise that he will pay calls made while he continues the owner."

Webster vs. Upton, Assignee, 91 U. S. 65.

"Where a purchaser of stock obtains certificate assigned by endorsement, he obtained full title to it and to shares represented by it as against the vendor."

Radio Electronics Television Co. vs. Bartniew, 32 Fed. Supp. 431.

As it has been pointed out to this Court previously in the brief, the western states in relation to assessments on mining stock, through their several Supreme Courts, have independently held that upon the bona fide transfer of shares of stock, the transferee has been liable for subsequent assessments.

Seyberth vs. American Commander M. & M. Co., 245 Pac. 392, at page 396 (Idaho).

It must be remembered that under the by-laws of the Corporation, treasury stock is not assessable, and that the stock was never issued from the treasury to the Pearsons.

Seyberth vs. American Commander M. & M. Co., 245 Pac. 392, (Idaho).

Child vs. Idaho Hewer Mines, 284 Pac. 80 (Wash.)

Berkley Hillside Properties Company vs. Kelly, 247 Pac. 600 (Calif.)

To allow the decision of the Circuit Court of Ap-

peals for the Ninth Circuit to stand, reverses the decisions of the Supreme Courts of the several western states by silence and acquiescence.

As this Court has previously pronounced:

> "When the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal and Courts of a State, certiorari will lie."
>
> *Forsyth vs. City of Hammond,* 166 U. S. 506; 41 L. Ed. 1095.
>
> "Among the considerations thus suggested are those which indicate why in this case the Court properly exercised its power and issued the Writ of Certiorari. There was a conflict between the decision of the Circuit Court of Appeals and the Supreme Court of the State."
>
> *Forsyth vs. City of Hammond,* 166 U. S. 506; 41 L. Ed. 1095.

Calling once more to this Court's attention its statement in Re Church Building Company, 299 U. S. 24; 81 L. Ed. 16:

> "The provision (certiorari) contemplates the employment of the writ in instances not covered by Section 240 of the Judicial Code, (28 U. S. C. A., Sec. 347), and affords ample authority for using the writ for an auxiliary process and as a means of giving full force and effect to existing appellate authority and of furthering justice in other kindred ways."

CONCLUSION

At first blush it is conceded by petitioners that the petition seems to generally be not one in which this Court will take cognizance. However, upon second thought and a judicious weight of the questions involved, it then appears that the Circuit Court has repealed the general law of the several states by this decision, and for that reason it is most earnestly exhorted that this Court consider the matter of the issuance of the Write of Certiorari.

Respectfully submitted,

R. W. NUZUM,
Attorney for Petitioners, Morris Pearson and Ebba Pearson, his wife.

WILMOT W. GARVIN,
Of Counsel for Petitioners, Morris Pearson and Ebba Pearson, his wife.